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NO. 96-1037

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

THE KIOWA TRIBE OF OKLAHOMA
a federally recognized Indian Tribe
Petitioner

v.

MANUFACTURING TECHNOLOGIES, INC.,
an Oklahoma corporation
Respondent

On Writ of Certiorari
to the Court of Appeals, Division I
For the State of Oklahoma

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under the Indian Commerce Clause, a federally recognized Indian tribe that has not waived its sovereign immunity, is subject to the "inherent jurisdiction" of a state court because the commerce from which the suit arises took place, in part, outside tribal territory?

2. Whether, under the Indian Commerce Clause and the Treaty Clause, state jurisdiction over Indian tribes can be limited solely by an explicit "ouster" of that jurisdiction by Congress?

LIST OF PARTIES

Petitioner:

The Kiowa Tribe of Oklahoma, a federally recognized Indian Tribe

Respondent:

Manufacturing Technologies, Inc., an Oklahoma corporation

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OPINION BELOW

The opinion of the Oklahoma Court of Civil Appeals, Division I was not published or otherwise reported. The text of the opinion is reproduced in the Petition for a Writ of Certiorari, Appendix p. 1 through 4.

JURISDICTION

The opinion of the Oklahoma Court of Civil Appeals, Division 1, was entered June 28, 1996. Certiorari was denied by the Oklahoma Supreme Court in September 25, 1996. The Petition for a Writ of Certiorari was filed December 23, 1996. Certiorari was granted June 27, 1997. Jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

Article I, Section 8, Clause 3 of the United States Constitution:

> The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes. . . .

Article II, Section 2, of the United States Constitution:

> [The President] shall have Power, by and with the advice and consent of the Senate to Make Treaties . . . .

Article VI, Clause 2 of the United States Constitution:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land;

> and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

The Kiowa Tribe of Oklahoma ("Kiowa" or the "Tribe") is a federally recognized Indian tribe. 61 Fed.Reg. 58,211, 58,213 (1996). Federal recognition means that Kiowa has "the immunities and privileges available to . . . federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States. . . ." 25 C.F.R. § 83.2. As a part of this relationship, Congress has a trust responsibility to protect each tribe's sovereignty. 25 U.S.C. § 3601(2).

Kiowa's government is based in Carnegie, a small town in southwestern Oklahoma. There are 11,007 members enrolled in the Kiowa tribe. (Official Tribal Roll).

Kiowa's original homeland was in what is now South Dakota, in the vicinity of the Black Hills. The Tribe was nomadic. It ranged from the Yellowstone in the north to Belize in the south. Marriott, Alice, *The Ten Grandmothers*, University of Oklahoma Press (Norman, Okla. 1945) By the early 19th century, the Tribe controlled much of what is now western Oklahoma. McCoy, Ronald, *Kiowa Memories*, Morning Star Gallery (Santa Fe, N.M. 1987) The Kiowas were "horse Indians" who were able to "hold out and protect their lands in a striking manner." Mayhall, Mildred P., *The*

Kiowas, University of Oklahoma Press (Norman, Okla. 1962).

Eventually, Kiowa made treaties with the United States. Treaties were made in 1837 (7 Stat. 533), 1853 (10 Stat. 1013), 1865 (14 Stat. 717) and 1867 (15 Stat. 581, 589). The 1867 treaty is known as the Medicine Lodge Treaty. It set aside a reservation in what is now southwestern Oklahoma. In less than 30 years, Kiowa's reservation lands were taken. The former reservation was divided into 160 acre plots and given to individual members under the terms of the Jerome Agreement of October 6, 1892. Any land which was left unallotted was opened to settlement and the Tribe received cash compensation for it.

Kiowa was left without a reservation. It held no significant block of contiguous land. All that remained were small, scattered parcels that total about 1,200 acres. (Records, Kiowa Business Committee) Today, Kiowa lands consist of those parcels, along with some interest in about 3,000 acres held in trust for it and two other tribes.

Kiowa is not the only tribe in Oklahoma that does not have a reservation. For many years, Congress allotted reservation land to tribal members and opened excess land to settlement. (*See*, Cohen, Felix S., *Handbook of Federal Indian Law*, (1982 ed.) at pp. 127-139.) This allotment policy left all Oklahoma tribes with greatly diminished lands. Each tribe must now operate its government from a smaller and scattered land base. *Id.* at pp. 770-796.

Kiowa operates its government under a Constitution and Bylaws that were adopted in 1970. Thus, Kiowa's present day government is only 27 years old. Legislative authority is given to the tribal membership as a whole, but it is largely delegated to an eight member Business Committee. Day-to-day operations are performed by this Business Committee under executive powers. (Kiowa Constitution, Art. III and V) The Kiowa Constitution places some judicial authority in a Hearing Board and an Election Board. Largely, though, Kiowa relies upon the Anadarko Area Court of Indian Offenses for its judicial system.

Kiowa's government employs 108 people. For the most part, these tribal employees administer federal/tribal programs. (Reports, Kiowa Business Committee) Kiowa's annual budget for 1996-1997 was $970,533.00.[1] (Records, Kiowa Business Committee)

This particular case is one in a series of five related suits against Kiowa. Each of these suits is based on promissory notes that Kiowa gave to purchase all of the stock in Clinton-Sherman Aviation, Inc., an Oklahoma corporation.[2] Neither Congress nor the Tribe consented to

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[1]Federal program funding is largely excluded from this figure.

[2]The four other suits are *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995) *cert. denied* ____ U.S. ____, 116 S.Ct. 1675, 134 L.Ed.2d 799 (1996); *Aircraft Equipment Co. v. The Kiowa Tribe of Oklahoma*, 921 P.2d 359 (Okla. 1996) ("*Aircraft Equipment I*"); *JBJ Investments, Inc. v. The Kiowa Tribe of Oklahoma*, No. 87,032, Oklahoma Supreme Court (appeal pending); *Carl E. Gungoll Exploration Joint Venture v. The Kiowa Tribe of Oklahoma*, No. 87,031, Oklahoma

(continued...)

this suit or otherwise waived Kiowa's sovereign immunity. Rather, the Tribe specifically reserved its sovereign rights in the very note upon which it was sued. (JA 14)[3]

Clinton-Sherman Aviation, Inc. was an aircraft repair and maintenance business at the former Clinton-Sherman Air Force Base, near Burns Flat in western Oklahoma. *Hoover*, 909 P.2d at 60, n. 2. That former Air Force base is outside of "Indian County."[4]

In exchange for the part of the stock of Clinton-Sherman Aviation, Inc., Kiowa gave Manufacturing Technologies, Inc. ("Manufacturing Technologies") a promissory note for $285,000.00. (JA 9) The note was made by the Kiowa Tribe, itself. It was dated April 3, 1990, and was payable in two installments, due within 90 days from its date. (JA 11) The Tribe gave similar notes to purchase the rest of the shares of stock. *See Hoover*, 909 P.2d at 60; *Aircraft Equipment I*, 921 P.2d at 360. Each of the notes was secured by a pledge of the Clinton-Sherman Aviation, Inc. stock. *Hoover*, 909 P.2d at 60, note 3.

As part of the transaction, Kiowa refused to give its consent to suit or to waive its tribal sovereign immunity.

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[2](...continued)
Supreme Court (appeal pending). There are other related legal actions not described here.

[3]"JA" shall refer to the Joint Appendix filed in this proceeding.

[4]"Indian Country" is defined at 18 U.S.C. § 1151.

The parties inserted into each of the notes the following provision:

> Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma.
> (JA 14)

Manufacturing Technologies' district court petition alleges that the note was executed and delivered in Oklahoma City, outside Indian Country. (JA 10) There is some suggestion that the Tribal Chairman's signature may have been affixed to the note at the Tribal Chairman's office, which is within Indian Country.[5] But, there was no basis to dispute that the actual delivery of the note and the exchange of the note for the stock took place in Oklahoma City, outside Indian Country. Payments were to be made in Oklahoma City. (JA 10) The purchased business was also located outside Indian Country.[6]

During the 90 day note period, Kiowa did not make scheduled payments on any of the notes. Holders of the notes, except for Manufacturing Technologies, foreclosed upon the shares that they held as collateral. The shares were sold at public auction for $1.00. *Hoover*, 909 P.2d at 60. The note holders sued Kiowa for the deficiency that was left after the $1.00 was credited against the debt. Kiowa has

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[5]The note reflects "Carnegie, Oklahoma." (JA 11.)

[6]The location of the business is, however, within the boundaries of the Kiowa reservation set aside under the terms of the Medicine Lodge Treaty.

done nothing to stop or otherwise object to the foreclosure of the shares. The foreclosure has been completed.

Manufacturing Technologies did not bother to foreclose upon its collateral. Instead, it sued Kiowa upon the note in the District Court of Oklahoma County, Oklahoma. Kiowa moved to dismiss and asserted its tribal sovereign immunity as a defense. (JA 15) The motion was overruled upon the basis that tribal immunity did not apply "to going away from the reservation and engaging in business ventures." (JA-48)

In its Answer, Kiowa again raised its immunity as a defense. (JA 50) Kiowa also defended against Manufacturing Technologies' motion for summary judgment (JA 52) upon the basis of sovereign immunity. (JA 67) The trial court continued to disregard the immunity defense. It entered judgment against Kiowa for $285,000.00, plus interest and costs. (JA 77)

Kiowa appealed the judgment. Again it asserted the defense of sovereign immunity. The Oklahoma Court of Civil Appeals, Division 1,[7] concluded it was bound by the Oklahoma Supreme Court's decision in *Hoover*, which was handed down during the time this appeal was pending. The

[7]The Oklahoma Court of Civil Appeals is Oklahoma's intermediate appellate court. Under Oklahoma procedure, appeals are filed with the Oklahoma Supreme Court. The Oklahoma Supreme Court has the discretion to assign cases to the intermediate appellate court for decision. The intermediate appellate court decisions are subject to review on petition for certiorari to the Oklahoma Supreme Court. The Oklahoma Supreme Court denied Kiowa's petition for certiorari to review this case.

Court of Civil Appeals observed, "[t]his Court will not presume to second guess the reasoning of our Supreme Court." It then held, "[t]he promissory note at issue may be enforced in state court, the doctrine of sovereign immunity notwithstanding." (Cert. Pet. A 4)[8]

This particular case has not yet resulted in efforts to collect the judgment from Kiowa. But in the related cases, there have been repeated, extensive and disruptive collection efforts. Kiowa's tribal oil and gas severance taxes were seized through state court creditor's bill and garnishments. Tribal tax revenues that are needed to run Kiowa's government are being paid to and held by the Oklahoma County Court Clerk.

These collection efforts also interfered with Kiowa's right to enforce its own law in its own land. Kiowa's tax statutes create a lien on lands within Kiowa's Indian Country if the oil and gas severance taxes are not paid. Kiowa had the right to foreclose this lien because the oil and gas producers paid the tax to the Oklahoma County Court Clerk instead of to Kiowa. Kiowa was ordered not to enforce its law.

The judgment creditors in the related cases did not limit collection efforts to tribal funds. Federal monies were seized. Funds that Congress authorized to be expended on education, Head Start, job training and housing have been frozen by state court garnishment actions. These federal

[8]"Cert. Pet. A" refers to the appendix of the petition for certiorari filed in this proceeding.

monies were appropriated under the Indian Self Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.*, and the Indian Tribal Judgment Funds Use and Distribution Act, 25 U.S.C. 1401 *et seq.* Congress' decision to enact these programs has essentially been overridden by the state court's decision to enforce its own judgment.[9]

If allowed to stand, the judgment in this case will be collected in the same manner. The Oklahoma Supreme Court held that if it has the power to render a judgment, then it has the power to enforce it. *Aircraft Equipment Co. v. Kiowa Tribe of Oklahoma*, 939 P.2d 1143 (Okla. 1997) ("*Aircraft Equipment II*"), *cert. pending, Kiowa Tribe of Oklahoma v. Aircraft Equipment Co.*, U.S. Supreme Court, No. 97-216. Hence, the damage award in this case can be used to seize the Tribe's property, stop its laws and shut down its government.

SUMMARY OF ARGUMENT

Congress has plenary authority over Indian Commerce and Indian affairs because this power was granted to it under the Indian Commerce Clause and the Treaty Clause. U.S. Const. Art. I, § 8, cl. 3; Art. II, § 2. Congress exercised

[9]See pgs. 5-6, fn.2 and pg. 21, fn. 15 for citations to the related cases in which tribal taxes were seized and federal monies were frozen. The federally appropriated funds were recovered by the Tribe after about one year of legal challenges. The tax revenues and other tribal funds are still being held pending the outcome of other suits.

this power and decided that tribes should be self-sufficient and economically stable. This goal of tribal self-determination is to create strong tribal governments that can operate quality services for their communities and economies. 25 U.S.C. § 450(b).

Congress also has a trust responsibility to protect the sovereignty of tribal governments. Tribal sovereignty includes the doctrine of tribal immunity. Congress has not abandoned this doctrine, but instead, has reaffirmed it and even specifically preserved it in one act. 25 U.S.C. § 450n(1); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). Immunity is vital to protect a new and developing tribal government from the costs and demands of litigation. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978).

The regulation of tribal sovereignty is the sole province of the federal government. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed 2d 10 (1980). Tribal immunity is privileged from diminution by the states. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 106 S.Ct. 2305, 2313, 90 L.Ed. 881 (1986).

The Supremacy Clause requires that Oklahoma respect supreme federal law on tribal immunity. Oklahoma must regard tribal immunity as the "law of the land for the states." *Howlett by and through Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990). Oklahoma

may not use "comity" to refuse to acknowledge supreme federal law. *Idaho v. Couer d'Alene Tribe of Idaho*, __ U.S. __, 117 S. Ct. 2028, 65 U.S. L.W. 4540, 4544 (1997).

Because tribal immunity is the supreme law of the land, Oklahoma must recognize that it has no jurisdiction in this case and dismiss it.

Finally, Oklahoma is divested of its power over Indian commerce because the Constitution allocates to Congress the authority to regulate this area. Thus, Congress is not required to pass legislation which ousts Oklahoma from jurisdiction over suits that arise from Indian Commerce.

ARGUMENT

I.

AN INDIAN TRIBE IS NOT SUBJECT TO SUIT IN A STATE COURT, EVEN IF SOME OF THE DISPUTED COMMERCIAL ACTIVITY TOOK PLACE OUTSIDE INDIAN LAND.

Introduction

This case poses the question of whether tribal sovereign immunity protects Indian tribes from state court damage suits that arise from the tribe's commerce outside Indian Country. For conceptual clarity, we note that when this brief refers to "tribal sovereign immunity" it means a

tribe's immunity from suit in state courts. In this brief, "tribal sovereign immunity" does not suggest a tribe's immunity from state taxation or regulatory laws, if a tribe operates outside of its Indian Country. *Mescalero Apache Tribe v. Jones*, 411 U.S. 130, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973) (specific tribal activity subjected to state tax laws); *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962) (state fish trap regulations applied). Neither does this brief suggest that tribal sovereign immunity means a bar to certain state taxes for on-Indian Country activity. *Citizen Band,* 111 S.Ct. at 912 (tribe has obligation for collection of state cigarette tax on sales to non-tribal members on Indian Country).

This brief makes little mention of the Oklahoma Court of Civil Appeals' opinion which decides this case. This is so because the Oklahoma Court of Civil Appeals simply deferred to the Oklahoma Supreme Court's decision in *Hoover*. Thus this brief focuses on *Hoover*, and its predecessor cases, rather than making an extensive analysis of the Oklahoma Court of Civil Appeals' opinion.

A.

Only Congress Has the Power to Regulate Indian Commerce And Tribal Immunity.

Tribal immunity was most recently reviewed in *Citizen Band,* 111 S.Ct. at 912. There, Oklahoma asked this Court to limit the immunity doctrine to permit it to recover a money judgment against an Indian tribe. Oklahoma sought to recover damages for uncollected state cigarette taxes upon

sales made on Indian Country to non-tribal members. This Court determined that sovereign immunity did not excuse the tribe from the obligation to assist in collection of the tax. But, immunity did bar Oklahoma's effort to obtain a judgment against the tribe. *Id.* at 911.

This Court recognized that Congress has never abandoned the immunity doctrine, although it has always been at liberty to do so. Rather, this Court noted, "Congress has consistently reiterated its approval of the immunity doctrine." Citing Congress' pursuit of its "overriding goal" of encouraging tribal self-sufficiency and economic development, this Court concluded that "under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity." *Id.* at 910.

This Court also holds that, with the adoption of the Constitution, Indian relations became the "exclusive province of federal law." *Oneida County, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 105 S.Ct. 1245, 1251, 84 L.Ed.2d 169 (1985). The Constitution expressly grants to Congress the power to regulate Indian commerce. This is a considered change from the Articles of Confederation. That document attempted to divide regulation of Indian Commerce between the States and the central government. This division was unworkable and thus it was changed.[10]

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[10]Madison cited as one of the deficiencies of the Articles of Confederation its effort to leave some control over Indian commerce to the states. The Articles limited the central government's authority to "Indians, not members of the States" and required that any regulation of (continued...)

Congress, in its exercise of power under the Indian Commerce Clause, and, for a period of time, under the Treaty Clause, has been the sole source of federal policy for Indian affairs. *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973) (federal power over Indian affairs derives from regulating Indian commerce and from treaty making).[11] Congress' power over Indian affairs is described by this Court as "plenary." *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977). Congress itself recognizes that the Constitution grants it plenary power over Indian affairs. 25 U.S.C. § 4101(3).

In the exercise of this plenary power, Congress upholds the federal government's unique responsibility to tribes by creating and implementing a tribal self-determination policy. 25 U.S.C. § 450(a) Congress supports and assists Indian tribes to develop strong and stable tribal governments that can operate quality programs and economies within tribal communities. 25 U.S.C. 450(b).

Congress' "overriding goal" of encouraging tribal self-sufficiency and economic development emphasizes both tribal governments and the fact that "tribal sovereignty is

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[10](...continued)
Indian commerce not "violate or infringe upon the legislative right of any state within its own limits." *See* The Federalist Papers, No. 42, p. 269, (C. Rossiter, ed. 1961).

[11]Federal power over Indian tribes has also been attributed to the rights derived from discovery and conquest. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279, 75 S. Ct. 313, 317, 99 L.Ed. 314 (1955).

dependent on, and subordinate to, only the Federal Government." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 107 S.Ct. 1083, 1087, 1092, 94 L.Ed.2d 244 (1987), *citing Colville*, 100 S.Ct. at 2081. As a part of this emphasis upon tribal governments, Congress recognizes that the United States' trust responsibility includes the protection of tribal government sovereignty. 25 U.S.C. § 3601(2).

Tribal sovereignty includes the doctrine of tribal immunity. *Citizen Band*, 111 S.Ct. at 909. The United States and this Court have repeatedly and consistently recognized that Indian tribes have the common-law immunity from suit that was traditionally enjoyed by sovereign powers. *Santa Clara*, 98 S.Ct. at 1677 *citing Turner v. United States*, 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919); *United States v. USF&G*, 309 U.S. 506, 60 S.Ct 653, 84 L.Ed. 894(1940); *Citizen Band*, 111 S.Ct. at 909.

Tribal immunity means that unless court jurisdiction is created by Congressional or tribal consent to suit, any attempted exercise of judicial power over a tribal sovereign is void. *USF&G*, 60 S.Ct. at 656. Jurisdiction, or power, over a sovereign is not an inherent power of the sovereign's court. Rather, it is a power created in the court by the sovereign's own consent to suit.

Tribal immunity is an inherent aspect of Indian tribes' powers of limited sovereignty which has never been extinguished by Congress. *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 1086, 55 L.Ed.2d 303 (1978), *citing* F. Cohen, *Handbook of Federal Indian Law* 122

(1945). Because it is an inherent aspect of Indian tribal sovereignty, immunity is not a creation of Congress. It is, rather, an inherent aspect of a separate sovereign that pre-existed the Constitution. *Santa Clara*, 98 S.Ct. at 1675, 1677.

B.

Congress Chose to Retain Indian Tribes' Inherent Immunity To Suit.

Although tribal immunity is not a Congressional creation, Congress is vested with authority to create and define jurisdiction over an Indian tribe by giving its consent to suit. *Santa Clara*, 98 S.Ct. at 1677; *Three Affiliated Tribes*, 106 S.Ct. at 2313.

Legislative reform of sovereign immunity of states and local governments is commonplace. These legislative reforms create some governmental liability, but also protect sovereigns from unlimited exposure, asset seizure and executions that could interfere with the operation of the government. Permissible claims are restricted and are defined in such a way as to avoid governmental policy being tested in damage suit litigation.[12]

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[12]*See e.g.* 51 O.S. § 151 *et seq.* (Adopting the doctrine of sovereign immunity for Oklahoma, then providing detailed description of permissible suits against Oklahoma, limiting total liability to a set dollar amount, eliminating punitive damages and regulating the means of enforcing judgments); 5 Vern. Tex. Code Ann. § 101.001 *et seq.* (permitting limited suits, limiting extent of liability, excluding punitive

(continued...)

Tribal immunity has also been analyzed. Congress has reviewed the tribal immunity doctrine and has consistently reiterated its approval. *See Citizen Band*, 111 S.Ct. at 910, *citing* the Indian Financing Act, 25 U.S.C. § 1451 *et seq.* and the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.* Congress has even specifically stated that nothing in the Indian Self Determination Act was to be construed as "affecting, modifying, diminishing or otherwise impairing immunity from suit enjoyed by an Indian tribe." 25 U.S.C. § 450n(1). Tribal immunity is not a forgotten and untested remnant of common law. Instead, it is a considered part of federal policy, as Congress exercises its plenary powers over Indian affairs.

If Congress decides not to retain tribal immunity as a part of its self-determination policy, then Congress may do so. "Congress knows how to limit the sovereign immunity of others when it wants to." *In re Greene*, 980 F.2d 590, 594, n. 3 (9th Cir. 1992).

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[12](...continued)
damages and regulating methods of collecting judgments); Kansas Stat. Ann. § 75-6101 (authorizes limited suits, limits the amount of damages, eliminates punitive damages, regulates methods of enforcement of judgments) 28 U.S.C. § 1602 *et seq.* (recognizing that foreign states are immune from the jurisdiction of the courts of the United States, and courts of the states, except for specified suits; limiting punitive damage claims; exempting foreign states from attachment, arrest and execution, except for designated classes of property.)

C.

Congress' Decision to Retain Tribal Immunity is Backed by Compelling Economic Considerations.

In order to make its policy of self-determination function, Congress' goal is to create working tribal governments. *Cabazon*, 107 S.Ct. at 1092. Yet, because Congress' self-determination policy is relatively young,[13] most tribal governments are new at the role Congress created for them.

Fledgling governments view immunity as necessary for survival. *See Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1187, 59 L.Ed.2d 416 (1979) (the heavily indebted post-Revolutionary states thought immunity was "a matter of importance."); *Seminole Tribe of Fla. v. Fla.*, 517 U.S. ___, 116 S.Ct. 1114, 1148, 134 L.Ed. 252 (1996) (Eleventh Amendment adopted to limit federal jurisdiction over suits against the relatively young state governments).

Both Congress and this Court recognize that the expense of litigation would impose "serious financial burdens" on already "financially disadvantaged tribes." *Santa Clara*, 98 S.Ct. at 1680, n. 19 *citing* 1965 Hearings 131, 175; Summary Report 1679; House Hearings 69 (remarks of the Governor of San Felipe Pueblo). As the

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[13]Comprehensive legislation to reform major federal service programs began in the early 1970's. Cohen, Felix S., *Handbook of Federal Indian Law*, (1983 ed.) p. 181.

experience with the immunity doctrine in this country shows, governments reform their immunity only after they obtain economic strength and maturity necessary to handle financial burdens. Protection of newly developing tribal governments from the costs and risks of litigation is a compelling concept to Congress. Certainly, such protection is familiar to this country's history and was key to the development of strong national, state and local governments.

Kiowa was stripped of its immunity in this case and its experience proves that immunity is vital to a tribe's existence. Manufacturing Technologies' suit, along with the related suits, have resulted in judgments, including interest and fees, that total more than $1,500,000.00.[14] This amount is greater than Kiowa's 1996-1997 annual budget. Could any sovereign be expected to survive such a catastrophe?

The burden of these judgments is not theoretical. Kiowa had its tribal oil and gas severance taxes seized by state court post judgment remedies. Its federal program funds were frozen by state court garnishment. Also, and perhaps more incredibly, Kiowa was enjoined from enforcing its own tribal tax laws in Indian Country subject to its

[14]In *Hoover*, the judgment now equals $307,425.39. In *JBJ Investment v. Kiowa Tribe of Oklahoma*, No. 87,032, Okla. Supreme Ct., the judgment now equals $306,945.67.41. In *Carl E. Gungoll Exploration Joint Venture v. The Kiowa Tribe of Oklahoma*, No. 87,031, Okla. Supreme Court., the judgment now equals $70,141.51. In *Aircraft Equipment I*, the judgment now equals $379,327.70.

jurisdiction.[15] If a sovereign can no longer tax or enforce laws, then what remains of the sovereign?

Garnishment of federal funds could shut down the federal programs which Congress chose to enact. Seizure of Kiowa's tax revenues takes monies that are needed to pay salaries to tribal government employees, maintain tribal real and personal property, supplement federal-tribal programs and operate housing, education and job training programs. (See cert. pet. appendix at p. 24, in *Kiowa Tribe of Oklahoma v. Aircraft Equipment Company*, No. 97-216, United States Supreme Court.) This seizure of tribal funds infringes upon and invades Kiowa's right to self-government.

[15]Seizure by creditor's bill of Kiowa's oil and gas severance tax was upheld, along with the issuance of an injunction prohibiting Kiowa from enforcing its tribal tax lien law, in *Aircraft Equipment II*, 939 P.2d at 1149 (Okla. 1997). Garnishment of the oil and gas severance tax is on appeal in *Aircraft Equipment Company v. The Kiowa Tribe of Oklahoma*, No. 85,272, Okla. Supreme Ct.

Post-judgment garnishments have frozen federally appropriated funds intended for various social programs under 25 U.S.C. § 450(a) *et seq.* (Indian Self-Determination and Education Assistance Act) and funds intended for various tribal governmental purposes under 25 U.S.C. § 1401 *et seq.* (Indian Tribal Judgment Funds Use and Distribution Act) *Carl E. Gungoll Exploration Joint Venture v. The Kiowa Tribe of Oklahoma v. Anadarko Bank & Trust Co., Garnishee*, No. CIV-96-2059-T, United States District Court for the Western District of Oklahoma (before removal, CJ-90-10166, District Court of Oklahoma County); *Hoover v. The Kiowa Tribe of Oklahoma v. The First National Bank of Mountain View, Oklahoma, Garnishee*, No. CIV-96-1624L, United States District Court for the Western District of Oklahoma (before removal, No. CJ-91-667, District Court of Oklahoma County). The federal program funds have now been recovered. The seizure of the oil and gas severance tax, along with the injunction prohibiting Kiowa from enforcing its own laws, is ongoing.

D.

Oklahoma Cannot Destroy Tribal Immunity By Making It A "State Law Question."

Although Congress uses tribal immunity to carry out its policy of self-determination, the Oklahoma Supreme Court produced a theory that allows it to disregard tribal immunity. Oklahoma reached this unique result even though neither the tribe nor Congress consented to suit and even though the tribe expressly reserved all of its sovereign rights in the disputed transaction. Oklahoma ignores the fact that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States. *Colville*, 100 S.Ct. at 2081. Oklahoma also completely disregards the proposition that "tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the states." *Three Affiliated Tribes*, 106 S.Ct. at 2313.

The Oklahoma Supreme Court's rationale has its footing in *Lewis v. Sac and Fox Tribe*, 896 P.2d 503 (Okla. 1994) *cert. denied* ____ U.S. ____, 116 S.Ct. 476, 133 L.Ed.2d 405 (1995). *Lewis* found that Oklahoma had jurisdiction over an individual's suit against a tribal housing authority. The suit was over the conveyance of housing authority land to the individual. The Oklahoma Supreme Court decided that "[o]nly that litigation which is explicitly withdrawn by Congress or that which infringes upon tribal self-government stands outside the boundaries of permissible

state court cognizance." *Lewis*, 896 P.2d at 508.[16] Because *Lewis* determined that the defense of tribal immunity had been "abandoned," it did not deal with the concept that jurisdiction over an immune tribe may be created only by either a Congressional or tribal consent to suit. *Lewis*, 896 P.2d at 511, n. 59.

Lewis concentrated upon the idea that, under our system of dual sovereignty, a state's jurisdiction is concurrent with federal jurisdiction, unless that jurisdiction is ousted by an affirmative act of Congress. *Lewis*, 896 P.2d at 509-510. Apparently, the fact that Congress had not passed statutes to create tribal immunity was understood by the Oklahoma Supreme Court to mean that there was no concept of tribal immunity to limit its jurisdiction. Because *Lewis* failed to recognize that a court's power over an immune tribe is created only by Congressional or tribal consent to suit, *Lewis* left the Oklahoma Supreme Court with an overly broad concept of its own jurisdiction.

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[16]The *Lewis* rationale has some relation to the Oklahoma Supreme Court's reasoning in *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985) (*Seneca-Cayuga I)* (finding state residuary jurisdiction interstitially over tribal gaming upon tribal land, in the absence of preemption by Congressional legislation or infringement upon tribal self-government.) *Seneca-Cayuga I* resulted in *Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989) (*Seneca-Cayuga II)* where the state prosecution of the remanded action in *Seneca-Cayuga I* was enjoined because Oklahoma lacked jurisdiction over an Indian tribe as a matter of supreme federal law.

Next, the Oklahoma Supreme Court decided one of the actions related to this case, *Hoover*, 909 P.2d at 62.[17] In *Hoover*, an individual sued Kiowa in state court upon a promissory note that was said to have been executed outside Indian Country. There was neither Congressional nor tribal consent to suit. The note contained the same express clause which stated that tribal sovereign rights were not waived. The Oklahoma Supreme Court returned to its *Lewis* decision for the idea that, in the absence of a Congressional ouster of its jurisdiction, Oklahoma had "inherent concurrent jurisdiction." *Hoover*, 909 P.2d at 61.

In *Hoover*, unlike *Lewis*, the court was faced with a clearly asserted defense of tribal immunity to suit. Kiowa repeatedly contended that Oklahoma had no jurisdiction because there was no tribal or Congressional consent to suit. To construct a response, the Oklahoma Supreme Court began with the proposition that state courts may decide the merits of a tribal immunity defense and cited *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 103 L. Ed. 2d 924 (1989). Oklahoma then drew upon *Nevada v. Hall* for the idea that a sovereign's immunity was not binding in another sovereign's court, but, that the forum sovereign may apply its own laws to decide the immunity defense. *Hoover*, 909 P.2d at 62. It concluded that Oklahoma's obligation to honor a tribal immunity defense was solely a matter of comity. *Hoover*, 909 P.2d at 61-62, *citing Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 545 (1988)

[17]*Hoover* was a suit upon one of the promissory notes in the series of promissory notes Kiowa gave to purchase shares of Clinton-Sherman Aviation, Inc. *Hoover*, 909 P.2d at 60.

cert. denied 490 U.S. 1029, 109 S.Ct. 1767, 104 L.Ed.2d 202 (1989).

Because Oklahoma modified its own immunity to suit, the Oklahoma Supreme Court reasoned that Oklahoma had no obligation to respect tribal immunity. By using comity, the *Hoover* court tried to justify the use of Oklahoma law and the avoidance of supreme federal law.

Following *Lewis* and *Hoover*, the Oklahoma Supreme court has stated its position repeatedly. It continues to do so even when two of its own members pointed out that Oklahoma's position directly contradicts the holding of the Court of Appeals for the Tenth Circuit in *Sac & Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir. 1995). In *Sac & Fox*, the Tenth Circuit held that a tribe is immune from suit in state court regardless of whether activity occurs outside Indian Country. *Id.* at 1065. The dissent in *Aircraft Equipment I* stated that the "majority opinion contravenes the mainstream of contemporary sovereign immunity jurisprudence. . . [and] is certainly contrary to *Sac & Fox* (citation omitted)." *Aircraft Equipment I*, 921 P.2d at 362 (Kauger, J. and Summers, J., dissenting).

The majority in *Aircraft Equipment I* tried to avoid the conflict with the Tenth Circuit and explained ". . . a federal court's [the 10th Circuit] pronouncement on a state law question lacks the force of authority in that it cannot bind this Court. (citation omitted). We follow the jurisprudence of *Hoover* and *Lewis* because in both cases certiorari was denied by the Supreme Court of the United States." *Aircraft Equipment I*, 921 P.2d at 361.

Although the opinion is not clear, apparently the "state law question" is Oklahoma's decision that it has "inherent concurrent jurisdiction" over an Indian tribe and that it can use comity to apply state law to decide the extent of the tribe's immunity. The *Hoover* holding was relied upon also in *First Nat. Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Committee*, 913 P.2d 299 (Okla. 1996).

E.

An Indian Tribe Is An Immune Sovereign Anywhere In The United States -- Even In Oklahoma; Supreme Federal Law Controls Waivers of Tribal Immunity.

The Oklahoma Supreme Court's refusal to honor Kiowa's tribal immunity draws heavily upon the *Nevada v. Hall* idea that an independent sovereign may apply its own law to measure its jurisdiction over another sovereign. *Hall* treats sister states as independent sovereigns that are free to determine their own policy concerning another state's claim of immunity. *Hall* finds that this freedom exists because there is no Constitutional restraint upon states' powers over other states.

The *Hall* analysis does not transfer to federal law on Indian commerce and affairs for two reasons: (1) Indian tribes are not foreign sovereigns and (2) the Indian Commerce Clause restrains state power over Indian tribes.

Indian tribes are not foreign or independent sovereigns, as *Hall* suggests is the case for sister states. Instead, Indian tribes are "domestic dependent nations". *Citizen Band*, 111 S.Ct. at 909. With respect to Indian tribes, the United States has a unique trust responsibility which compels the support and protection of tribal sovereignty. 25 U.S.C. § 4101(3); 25 U.S.C. § 3601(2). The nature of this federal commitment to Indian tribes has become a significant consideration in defining tribal sovereignty. When tribal sovereignty is measured, this consideration is perhaps more significant than the question of "on or off Indian country".[18]

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[18]While decisions of this Court on tribal immunity have not turned upon the "on-or-off" Indian Country issue, lower court decisions have considered the issue in reaching decisions in tribal immunity:

1. *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421 (Ariz. 1968) (Wrongful death action barred by Tribe's sovereign immunity, even though alleged tort took place outside of the exterior boundaries of the Tribe's reservation.)

2. *North Sea Products v. Clipper Seafoods Co.*, 595 P.2d 938, 939 (Wash. 1979) (Tribal immunity extends to tribal "commercial enterprise outside the boundaries of the reservation").

3. *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 674 P.2d 1376 (Ariz. Ct. App. 1983) (Breach of contract action arising out of business transaction initiated off-reservation barred by sovereign immunity; cited by Justice White in dissent from denial of certiorari in *Padilla*, 490 U.S. 1029 (1989), as indicating off-reservation immunity).

4. *Padilla v. Pueblo of Acoma*, 754 P.2d 845, 850 (N.M. 1988) (Tribe not entitled to sovereign immunity for off-reservation activities), *cert. denied*, 490 U.S. 1029 (1989).

5. *Dixon v. Picopa Const. Co.*, 772 P.2d 1104, 1109 (Ariz. 1989) (Sovereign immunity not applicable to tribal business engaged in off-reservation activities not connected with "tribal self-government or the promotion of tribal interests.").

(continued...)

The crossing of state or tribal boundaries is no longer a single inquiry test to analyze tribal sovereignty. This Court has long abandoned the *Worcester v. Georgia*, 6 Pet. 515, 516, 8 L.Ed.2d 483 (1832), thought that reservation and state boundaries formed a wall which laws cannot cross. Determining issues based solely upon geographic boundaries was proven inadequate and it should not be given new life.

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[18](...continued)

6. *Greene*, 980 F.2d at 594 (9th Cir. 1992) ("Since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes retain the immunity sovereigns enjoyed at common law, including its extra-territorial components."), *cert. denied sub. nom.*, *Richardson v. Mount Adams Furniture*, 510 U.S. 1039 (1994).

7. *Elliott v. Capital Int'l. Bank & Trust*, 870 F.Supp. 733 (E.D. Tex. 1994) (Bank chartered, governed, and owned by Indian tribe protected by sovereign immunity; bank did not waive immunity by engaging in extensive off-reservation commercial activities), *aff'd.* 102 F.3d 549 (5th Cir. 1996).

8. *DeFeo v. Ski Apache Resort*, 904 P.2d 1065 (N.M. App. 1995) (Tort claim for injury suffered at Tribe's ski resort held barred by sovereign immunity, even though most of resort located off of the Tribe's reservation, since the actual injury took place on a part of the resort within the Tribe's reservation), *cert. denied*, 903 P.2d 844.

9. *Federico v. Capital Gaming Int'l.*, 888 F.Supp. 354 (D.R.I. 1995) (Contract claim against Tribe held barred by sovereign immunity even though performance of the contract was to take place off of the reservation).

10. *Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1065 (10th Cir. 1995) ("Without an explicit waiver, the Nation is immune from suit in state court--even if the suit results from commercial activity occurring off the Nation's reservation."), *cert. denied*, ____ U.S. ____, 116 S.Ct. 57.

11. *Gayle v. Little Six, Inc.*, 555 N.W.2d 284 (Minn. 1996) (Civil claim arising out of conduct of Indian business entity, some of which occurred outside of Indian country, held barred by sovereign immunity), *petition for cert. filed*, 65 U.S.L.W. 3539 (Jan. 29, 1997) (No. 96-1215).

The "on-or-off" Indian Country issue is more usually used as a tool to analyze conflicts between state and tribal authority. *See Mescalero*, 93 S.Ct. at 1275 (off-reservation ski resort subject to state gross receipts tax, but exempt from state use taxes because of 25 U.S.C. § 465); *Organized Village of Kake*, 82 S.Ct. at 571 (within Alaska waters, Alaska conservation law applies to Indian fishing). Thus in some fact situations, the location of a taxable event or the location of an object of state regulation is a proper judicial consideration to use to decide the relative interests of a state, a tribe and the federal government.

The point of this case is neither a state tax nor a state regulation. The point of this case is whether there is any legal basis for Oklahoma's disruption of both Congressional policy and an Indian tribe by rendering and enforcing a judgment against the tribe. Seizing tribal tax revenues, freezing federally appropriated funds and enjoining enforcement of tribal law upon tribal land is virtually a complete infringement upon tribal self-government. A state has no such power with respect to an Indian tribe.

The Constitution's grant to Congress of power over Indian commerce and affairs, Congress' protection of tribal sovereignty and immunity, and Congress' goal to build strong tribal governments cannot be overcome by a private litigant who proposes that supreme federal law and Congressional policy are subject to state judicial frustration within the geographical boundaries of Oklahoma.

Congress is entitled to significant judicial deference when it exercises its Constitutionality assigned powers over

Indian commerce. This Court has recognized that, in the absence of clear indication of legislative intent, this Court should "tread lightly" in an area involving tribal sovereignty and the plenary authority of Congress. *Santa Clara*, 90 S.Ct. 1678. With respect to tribal immunity, Congress' own specific statutory preservation of tribal immunity, 25 U.S.C. § 450n(1), signals a legislative intent that counsels something beyond treading lightly. Oklahoma must be made to recognize the unique status of Indian tribes and respect Congress' exercise of its plenary authority.

Hoover's reliance upon the *Hall* reasoning is fundamentally wrong for yet another reason. The Indian Commerce Clause is a Constitutional restraint upon state power. Power over Indian commerce is assigned to Congress and thus cannot remain in a state. The lack of a restraint upon state power over sister states was key to the *Hall* opinion. Oklahoma can use *Hall* only if it can ignore the Constitutional restraints upon its power.

Hoover does not disregard all aspects of an Indian tribe's immunity, though. It does, at least implicitly, recognize that if Kiowa enters Oklahoma for commerce, it enters as an immune sovereign. If a tribe's commerce within a state involves concepts of extraterritoriality, then immunity has an extra-territorial aspect. *Greene*, 980 F.2d at 594 *citing Hall*, 99 S.Ct. at 1182. Oklahoma's recognition of this extra-territorial aspect of Kiowa's immunity is evident from the fact that *Hoover* determines whether, or to what extent, to respect Kiowa's defense of immunity. Thus, if Kiowa does some commerce within Oklahoma, even Oklahoma recognizes that Kiowa has inherent immunity to suit. The

question posed, then, is, "How can Kiowa lose its immunity?" When Oklahoma answers that question, Oklahoma encounters Constitutional restraints upon its power.

If Oklahoma decides how a federally recognized Indian tribe can lose its immunity, then it must accept that the laws of the United States and the laws of the several states form one system of jurisprudence, which is the law of the land for the states. *Howlett*, 110 S.Ct. at 2438. Applying this one system of jurisprudence is not an issue of comity, as *Hoover* proposes. "The Constitution and laws of the United States are not a body of law external to the States, acknowledged and enforced simply as a matter of comity." *Couer d'Alene Tribe*, 65 U.S.L.W. at 4544. Oklahoma may not use comity to decide which part of federal law it will recognize.

Federal law is absolutely clear on how a tribe may lose immunity. Unless there is Congressional or tribal consent to suit, Indian tribes are immune. *Santa Clara*, 98 S.Ct. at 1677; *Citizen Band*, 111 S.Ct. 910 (*USF&G* reaffirmed; Oklahoma Tax Commission's request to modify *USF&G* rejected). To be effective, a waiver of immunity must be "unequivocally expressed." *Santa Clara*, 98 S.Ct. at 1677. There is no other means under federal law by which a tribe can be stripped of its immunity.

Because tribal immunity is an established matter of supreme federal law, the law of Oklahoma is that, an Indian tribe is immune from suit unless there is a proper Congressional or tribal consent to suit. "[T]he Supremacy

Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or refusal to recognize the superior authority of its source." *Howlett*, 110 S.Ct. at 2240. Here, Congress has not consented to suit and, not only is there no tribal consent, there is even an express reservation of all sovereign rights. Oklahoma's conclusion to use comity as a mechanism to ignore supreme federal law is plainly wrong. Oklahoma must recognize that Kiowa is immune to suit, that Oklahoma has no jurisdiction and that this suit must be dismissed.

Requiring Oklahoma to follow supreme federal law and recognize tribal immunity is appropriate. It respects a clear Constitutional allocation of power over Indian commerce to Congress. U.S. Const. art. I, § 8, cl. 3. It is consistent with the clear mandate of the Supremacy Clause that the "Judges in every state shall be bound" by the "Supreme Law of the Land." U.S. Const. art. VI, cl. 2. It preserves from state disruption Congress' pursuit of its policy of Indian self-determination. It permits Congress to use tribal immunity to build tribal governments, just as immunity was used by developing governments in this country's history.

The Constitutional allocation of power to Congress, the Supremacy Clause and Congress' pursuit of a comprehensive policy of Indian affairs, make it plain that any alteration of tribal immunity is a legislative matter. Congress, acting under powers delegated to it by Art. I, sec. 8, cl. 3 may, if it so chooses, reform tribal immunity. Congress may also elect to delay such reforms until it believes tribal governments are able to respond to a loss of

immunity or Congress may leave the reforms to the tribes themselves.

If the location of commercial contacts do justify some weight when applying the tribal immunity doctrine, then Congress is free to pursue that idea in the shaping of a comprehensive policy. Until Congress has done so, it is necessary to respect the fact that Congress now uses tribal immunity to shield both tribes and its self-determination policy from disruption by state judiciary. Congress' policies must apply nation-wide and not simply upon Indian Country.

Leaving reform of immunity to Congress is desirable for a practical reason. By legislation, Congress has the power to create a comprehensive policy that resolves relevant competing interests. Congress can balance the interests of tribes to preserve their ability to govern against the interest of potential claimants. This balancing requires an intricacy that is difficult to achieve within the confines of a court decision.[19] The disruption of Kiowa's government that resulted from *Hoover* evidences an uneven tilting that may be avoided in the legislative process.

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[19]For an interesting judicial solution to the problem of eliminating immunity, but preserving governments from economic disruption, *see Vanderpool v. State*, 672 P.2d 1153 (Okla. 1983). The Oklahoma Supreme Court recognized that abrogation of Oklahoma's immunity, "should be done by the Legislature and not the Courts" but proceeded to abrogate it anyway. It then replaced immunity with a "finding and determination" that looks and reads like a statute designed to reform immunity. *Vanderpool*, 896 P.2d at 1156-1157. The effectiveness of the *Vanderpool* decision was deferred for over a year to give the legislature time to react.

It is important to understand the full extent of Oklahoma restrictions on tribal immunity. As a practical matter, Kiowa will lose virtually all immunity. Because of the nature of Kiowa's remaining lands -- small plots that are checker-boarded through rural southwestern Oklahoma[20] -- it is difficult, at best, to conduct any meaningful commerce limited solely to that land. Virtually any commerce will involve, for banking services if nothing else, significant contacts off of Kiowa's land. Doubtlessly, virtually any contact outside Indian Country can, and will be used under the Oklahoma approach to find jurisdiction over an immune tribe. Most, if not all, of the other thirty-five federally recognized Indian tribes within Oklahoma will encounter the same problem. All of these tribes, like Kiowa, were left with small land bases after Congress allotted the former reservation lands.

Hoover is fundamentally wrong when it fails to recognize constraints upon state power that arise from the Indian Commerce clause and when it equates Indian tribes to independent sovereigns. *Hoover* is wrong as to the basic nature of tribal sovereignty and as to the extent of state power.

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[20]The lands are described in the Statement of the Case, p. 4.

II.

LIMITS ON STATE COURT JURISDICTION OVER INDIAN TRIBES DO NOT REQUIRE AN EXPLICIT OUSTER BY CONGRESS.

The Oklahoma Supreme Court created an avenue for judgment creditors and the state judiciary to join Congress in its exercise of authority over Indian affairs. By seizing Kiowa's governmental funds and by enjoining enforcement of tribal law upon Kiowa's Indian Country, judgment creditors and the state judiciary assert control over tribal government. The theory supporting this is that, because Congress has not ousted Oklahoma courts from jurisdiction over Indian tribes, Oklahoma courts thus must have inherent concurrent jurisdiction.[21]

The power to regulate Indian commerce is plainly delegated to Congress by the Indian Commerce Clause, Art. I, sec. 8, cl. 3, United States Constitution. The Indian Commerce Clause, and to some extent, federal actions under the Treaty Clause, Art. II, sec. 2, have resulted in Congress having plenary authority over Indian tribes. *United States v. Wheeler*, 98 S.Ct. at 1084. The power is so extensive as to make Indian relations the exclusive province of federal law. *Oneida*, 105 S.Ct. at 1251. States have been divested of virtually all authority over Indian commerce and Indian tribes in that "the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government

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[21]*Lewis*, 986 P.2d at 509.

than does the Interstate Commerce Clause." *Seminole Tribe of Fla.*, 116 S.Ct. at 1126.

States have power "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 115 S.Ct. 1842, 1854, 131 L.Ed.2d 881 (1995). The Constitutional transfer to the federal government of power over Indian commerce leaves no need for Congress to oust state court jurisdiction over Indian Commerce with specific legislation.

CONCLUSION

This case should be reversed with instructions that it be dismissed because, in the absence of a waiver of tribal immunity, there is no jurisdiction in Oklahoma courts.

Respectfully submitted,

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